slow service in transporting lumber over its shorter, direct route for all shippers requiring such service, at the same published tariff rates appellant and the circuitous routes charge for fast service in transporting lumber, without the train schedules or operating time consumed in performing either the fast service or the slow service being specified in published tariffs, or any *extra* charge being made or published for the slow service. The summary judgment (R. 223) and injunction of the district court (R. 224) were entered on April 3, 1959, and notice of appeal was filed in that court by appellant on April 10, 1959 (R. 231). Jurisdiction of this Court to review this case on direct appeal is conferred by 49 U. S. C. § 45. Probable jurisdiction was noted October 12, 1959, and the case was transferred to the summary calendar (R. 240), 80 S. Ct. 55.

STATUTES INVOLVED

The pertinent provisions of the Interstate Commerce Act (49 U. S. C.), sections 1(3)(a), (4), (10), (14), (15) and 6(1) and (7), and of the Elkins Act (49 U. S. C.), sections 41(1) and 43, involved in this appeal, are set forth in the Appendix hereto.

QUESTIONS PRESENTED

1. Whether, in view of its conclusions that "it is the function of the Interstate Commerce Commission to determine whether or not a delay in service is reasonable under all the facts and circumstances involved," and its finding of fact that after the Complaint herein was filed, the Commission instituted and now has under consideration its own investigation concerning the lawfulness of a 15-day "hold" service in the transportation of lumber by several other railroads (not including appellant), to make such findings and order as the facts may warrant, the district court erred in refusing to apply the settled rule of pri-

mary administrative jurisdiction applied by this Court in *U. S. Nav. Co. v. Cunard S. S. Co.*, 284 U. S. 474; *Director General v. Viscose Co.*, 254 U. S. 498; *Far East Conf. v. United States*, 342 U. S. 570; *Boston & Maine Railroad v. U. S.*, 358 U. S. 68, and other cases, and, thereupon to dismiss the complaint.

2. If question 1 is answered negatively, whether the district court erred in making the administrative decision, in effect, that appellant may not lawfully perform a slow or delayed transportation service for the same published tariff rates if charges for performing "normal" or fast service.

3. Whether, in view of its correct finding of fact that appellant's slow service is performed, for *all* traffic of *all* shippers alike desiring slower service, and the fact that appellant collects for the slower service and retains the full "published and approved tariff rates," the district court erred in holding that appellant's offering and performing the slower service constitutes "a device for the offer and giff of rebates, concessions, advantages, and discriminations in violation of the Elkins Act" whereby lumber of shippers requiring the slower service is transported by appellant "at less than the published rates on file with the Interstate Commerce Commission."

4. Whether, since appellant concededly collects and retains for performing the slower service, the "published and approved tariff rates" lawfully on file with the Interstate Commerce Commission specifying the rates and charges for transporting lumber, the district court erred in enjoining appellant from performing the slower service "unless and until such time, if at all, as there is in force with respect to the Union Pacific Railroad Company, defendant

[appellant], a tariff lawfully on file with the Interstate Commerce Commission naming the rates and charges for such privileges or facilities."

5. Whether, in view of the fact that there is no provision of law or any order, rule or regulation of the Commission expressly requiring appellant to publish in its tariffs the speed or schedules of its trains or time it will consume in performing transportation service, the district court erred in holding that any intentional slow or delayed service offered by appellant must be published in tariff form, and that competitive necessity provides no legal defense to this action.

STATEMENT

The Government's Complaint and its presentation of this case imply or make it appear that appellant has selected, singled out and connived with certain shippers of "roller" lumber by offering and performing for them a special, slow lumber movement for their special benefit, to the exclusion of so-called "firm order" lumber shippers and shippers of all other commodities, and has thereby granted to the "roller" lumber shippers special benefits, privileges, facilities and concessions not offered or granted to other lumber shippers or shippers of other commodities (R. 1-7).

Whether intentional or not, this misleading treatment of the case results in distortion of the facts and in implications which are contrary to the undisputed fact of record that appellant's slow service, as well as its fast service, is offered to and performed for any and all shippers requesting such service and for any traffic that any shipper may desire to be handled in that service (R. 127-128).

"Defendant [appellant] has made and does make available the performance of the slower freight serv-

> ice for all shippers desiring such service, including shippers of lumber, fruits and vegetables and other commodities, and defendant [appellant] has not withheld from any shippers the privilege of availing themselves of such slow service; that defendant [appellant] has not selected or acted secretly with any particular shippers in offering and performing such slower service; or withheld from any shipper the privilege of equally availing itself of such slow service or the use of freight cars, trackage and other facilities for such slow service and has not performed any service or afforded any facility for any shippers at less or different compensation than the regularly published tariff rates applicable via its line and applicable and available to the same shippers for the same or greater service and facilities via the longer circuitous routes described in paragraph 9 above."

The misleading implications are also contrary to the district court's finding 30 (R 203):

> "That defendant [appellant] has made and does make available the performance of the slower freight service for all shippers desiring such service, and has not selected nor acted secretly with any particular shippers in offering and performing such slower service. That nevertheless, the main users of such delayed service are certain lumber shippers."

Also, despite the fact that all of the numerous railroads participating in transcontinental routes compete for the "roller" lumber traffic (see railroads named in routes described, R. 117-121) and practically all of them offer and perform a slow service when requested by shippers for movement of lumber under circumstances identical to those under which appellant performs its slow service (see *Regulations For The Movement of Loaded Freight Cars*, 298 I. C. C. 371, 375-376), the Government has singled out this appellant railroad and seeks to enjoin it from competing

on equal terms with the numerous other railroads that will be free to continue performing slow service for the "roller" lumber traffic.[1]

"ROLLER" TRAFFIC

For many years, under certain commercial marketing conditions and distribution methods, shippers of various commodities have required, and railroads have provided, flexibility and variation in train schedules and transit time for movement of commodities from place of production to final markets or places of consumption (R. 116).

It is an established practice of long standing in the shipping, distributing and marketing of commodities under certain market conditions for shippers to consign shipments to themselves to some intermediate point, deliver the shipments to railroads and start them on their way from point of production before they have found buyers for the commodities, and to search for buyers while the commodities are moving in the direction of and nearer to markets where the shippers know from experience that they will ultimately find buyers. Such traffic is commonly called and will be referred to herein as "roller" traffic. When a buyer is found, the shipper gives a "reconsignment", or "diversion" order to the railroad having possession of the shipment, reconsigning or re-billing the shipment on the through rate to the newly found destination and buyer (R. 116).

Reconsignment or diversion of traffic while in transit is an established commercial practice of long standing and is fully authorized by railroad tariffs duly filed and pub-

1 The Government has filed a similar action against only one other railroad. In the District of Minnesota, it filed a suit entitled *United States of America v. Northern Pacific Railway Company*, Civil Action No. 3-57-164, which is being held in abeyance in that court.

lished with the Interstate Commerce Commission (R. 117). The reconsignment or diversion privilege which enables shipments to move from origin to final destination at the through rate is the "key" to this method or practice of transporting, distributing and marketing "roller" traffic. The practice has been long and well known to the Commission and has received its approval.[2]

Shippers of "roller" traffic generally desire a longer time for movement of such traffic than is required if the buyer and final destination of the shipment are known before the traffic moves from point of production or origin. To obtain such longer time in transit for such "roller" traffic, shippers have for many years followed the established practice of routing such traffic over longer or circuitous routes over which, as in the instant case, their

2 In *Detroit Traffic Asso. v. L. S. & M. S. Ry. Co.*, 21 I.C.C. 257 (decided in 1911), the Commission said at p. 259:

"The primary economic advantage of reconsignment is found in the increase in the fluidity and regularity of the movement of commodities; there is an important elimination of economic waste in the reduction of the handling of goods between the producer and the consumer, celerity of movement is increased, the direction of commodities to the point of most active demand is facilitated. In other words, *reconsignment increases the efficiency of transportation facilities in performing their most important function of bringing together supply and demand.* The shipper of perishable products is enabled to divert his shipment from a market already overstocked, thus often converting a prospective loss into a gain; he is enabled to take advantage of his latest possible information as to market conditions. Similar advantages are seen in the movement of lumber and grain and other commodities of universal necessity." (Italics added.)

In *Central Commercial Co. v. L. & N. R. R. Co.*, 27 I.C.C. 114 (decided May 12, 1913), the Commission said at page 115:

"Diversion and reconsignment are required in the conduct of modern business and are to be regarded as commercial necessities. Many of the railroads of the country permit the practices and thousands of carloads of coal, lumber, fruit and vegetables, and other commodities are reconsigned and diverted annually upon the payment of the through rate, point of origin to destination, with or without charge per car for the service rendered in making the diversion in the movement."

shipments move at the same tariff rates and charges at which they move over shorter direct routes (R. 116). This practice of shippers routing their "roller" traffic over longer circuitous routes to obtain more time in transit to enable them to find buyers has also received the Commission's approval.[3]

To compete with the longer circuitous routes for such "roller" traffic, railroads, such as appellant, having the shorter direct routes must render a transportation service which is slower than they accord traffic not requiring such longer transit time (R. 116).

Establishment and maintenance at the same tariff rates, fares and charges, by appellant and other railroads of fast, slow or different speeds of freight train schedules and services, adjusted for competition with competing railroad lines and routes, and to the marketing and distribution needs of patrons, is a practice that has always prevailed in competitive railroad transportation operations in the United States (R. 122).

Appellant, having a shorter, if not the shortest, transcontinental railroad route, has provided, from time to time during at least the past 20 years, for such "roller" traffic requiring such longer time in transit a service designated as "SMX," an abbreviation meaning "slow manifest service" (R. 116). In that service shipments are moved from division or subdivision terminal to the next division or subdivision terminal in "local" or "drag" trains regu-

3 In *Quality Gas & Oil Co. v. Northern Pac. Ry. Co.*, 185 I.C.C. 395 (1932), the Commission said at p. 398:

"* * * Indirect [circuitous] routes result from the desire of the carrier having the long route to compete with the line maintaining the short route. Under such circumstances, the shipper has the right to designate which of the competing routes shall be used. The preservation of a competitive status as between carriers may be regarded as justifying such a right."

larly operated in the process of moving the available traffic, rather than in "through" trains (R. 122).

"ROLLER" LUMBER TRAFFIC

While the Complaint in this case has singled out "roller" lumber traffic, the fact, as stated in the district court's finding 12 (R. 199), is that appellant's slow service has always "applied to the movement of both perishable and dead freight, including lumber, and all other traffic of any shippers requiring slow service," although "roller" lumber traffic from the Northwest to the East, to which the Complaint and injunction are limited, constitutes the bulk of the traffic presently using such service.

In order to produce the vast quantity of lumber required during World War II, numerous small lumber mills commenced operation in the Northwest area of the United States, mainly in northern California, Oregon and Washington. These small mills did not have any established commercial market, as their production was primarily for war requirements. To remain in business when the war demand ended, it was necessary for these small mills to develop a method of merchandising adaptable to their operations, and the so-called "roller" or "transit" method of lumber marketing resulted. In this type of marketing, a negotiable instrument covering the shipment is turned over to wholesalers or brokers who endeavor to locate a purchaser while the shipment is moving eastward. When a sale is consummated the transfer to the buyer is accomplished through "diversion" or "reconsignment" instructions to the railroad while the shipment is en route (R. 116).

Most of this lumber moves to markets in the United States east of the Missouri and Missippi Rivers over the

lines and routes of several railroads which directly serve the Northwest area and which, with connecting lines, form numerous through routes with equal joint rates applicable thereto. The routes so formed vary in length and some of them are much longer than others. For example, the direct route via Union Pacific from Portland, Oregon, to Chicago, Illinois, is 2,259 miles, while routes via other railroads between those points are as much as 1,564 miles longer than the Union Pacific route. From Medford, Oregon, to Joliet, Illinois, the direct route via Union Pacific is 2,445 miles, while other routes are as much as 1,745 miles longer. From Smith Flat, California, to Chicago, Illinois, the Union Pacific direct route is 2,232 miles, while other routes are as much as 1,850 miles longer (R. 117-121).

As in the case of other "roller" traffic, shippers route "roller" lumber traffic over the longer circuitous routes requiring more time in transit, to enable them to find buyers while the shipments are moving eastward; and, in such circumstances, the "roller" lumber traffic is lost by the shorter routes, including this appellant's route, because of the longer time in transit utilized by the longer routes (R. 121-122). For example in the first month of a period during which the Commission had outstanding an emergency order prohibiting all railroads from performing slow movement of lumber, appellant lost over $500,000 in gross revenue because of shippers' routing over long circuitous routes lumber traffic appellant previously handled in slow service (R. 146).

It is an ironical fact that by granting rate relief from section 4 of the Interstate Commerce Act the Commission itself approved many of the long circuitous routes to compete at the same rates with the shorter, direct routes, in-

cluding the route of this appellant, which the Government now seeks to prevent from competing with the long circuitous routes for the "roller" lumber traffic, *Commodity Rates on Lumber and Other Forest Products*, 151 I. C. C. 763; 165 I. C. C. 561.

The fantastic circuity of some of the routes that compete at the same rates with the shorter, direct routes for the lumber traffic is graphically illustrated by two maps of record (R. 130-133). The wastefulness of the extreme circuitous routes, compared to the direct routes, in miles of transportation and number of interchanges of cars between connecting railroads is obvious from the description of illustrative routes at R. 117-121, from which the following extreme example is taken:

From Smith Flat, Calif., to Chicago, Ill.

Direct Route:

Camino, Placerville & Lake Tahoe Railroad to Placerville, California, Southern Pacific Company to Ogden, Utah, Union Pacific Railroad Company to Council Bluffs, Iowa, Chicago, Burlington & Quincy Railroad to Chicago, Illinois ..... 2232.5 miles.

Circuitous Route:

Camino, Placerville & Lake Tahoe Railroad to Placerville, California, Southern Pacific Company to Ogden, Utah, Union Pacific Railroad Company to Denver, Colorado, The Atchison, Topeka and Santa Fe Railway Company to Snyder, Texas, Roscoe, Snyder and Pacific Railway Company to Roscoe, Texas, The Texas and Pacific Railway Company to Sweetwater, Texas, Panhandle and Santa Fe Railway Company to

Houston, Texas, Texas and New Orleans Railroad Company to Dallas, Texas, St. Louis, San Francisco and Texas Railway Company to Sherman, Texas, St. Louis-San Francisco Railway Company to Kansas City, Missouri, Union Pacific Railroad Company to Council Bluffs, Iowa, Chicago and North Western Railway Company to Chicago ..... 4083.6 miles.

Miles longer than direct route 1851.1

It is noted that the above Union Pacific direct route requires little more than half the miles of transportation required by the circuitous route and that the direct route also requires only three interchanges of carloads between connecting carriers, while the circuitous route requires eleven car interchanges.

From carload unit cost data prepared and published by the Commission itself,[4] it is calculated that the fully distributed costs of hauling a 30-ton box car load over a 4,000-mile circuitous route in the Western District is $1,338.41 and that the fully distributed cost of hauling the same carload over a 2,200-mile direct route within the Western District is $774.11; or, an additional and wasteful cost of $564.30 in transporting a carload of lumber over the longer circuitous routes, many of which were approved by the Commission.

TARIFF PUBLICATION

Appellant in conjunction with numerous other railroads publishes and files with the Commission, in conformity with section 6 of the Act, tariffs of rates and charges,

4 Interstate Commerce Commission Statement No. 5-59, "Rail Carload Cost Scales By Territories For The Year 1958," December 1959, Table 2, page 63, columns (2), (3), (4) and (5).

rules and regulations governing line-haul transportation service and accessorial services, including diversion, reconsignment and demurrage charges, applicable to lumber and other commodities in carloads from points in Oregon, Washington and other western states. The same rates are charged and collected regardless of whether lumber moves in slow or fast service, or whether it moves over the shorter direct routes or over the longer circuitous routes.

The tariffs do not specify or provide for or offer the performance of fast, slow or other type service, nor do they publish any operating schedule or "running time" for performance of any transportation service for lumber or any other property by any particular train or in time for any particular market; nor do the tariffs publish or provide for any greater or lesser or additional or different freight charges for transporting one shipment faster or slower than another shipment.

The district court finds that appellant's slow service "contributes the use of its trackage and cars to provide a storage facility for transit lumber shippers," finding 21 (R. 201); and in "added carrier operational problems and costs occasioned by the additional need for power and working crews," finding 23 (R. 202); and in "excessive per diem cost for the use of foreign cars on defendant's [appellant's] line with the resulting tendency to unbalance the defendant's [appellant's] annual per diem offsets with other railroads," finding 24 (R. 202); and enables "roller" lumber dealers to "avoid the payment of demurrage" [which might accrue at destination if the carloads were moved in fast service], finding 25 (R. 202).

The district court concludes that appellant's slow lumber service extends to lumber shippers "privileges and/or facilities" not specified in published tariffs in violation of section 6(7) of the Act and section 1 of the Elkins Act (R. 220), and the injunction enjoins appellant from performing slow service for shipments of lumber "unless and until such time, if at all, as there is in force with respect to the Union Pacific Railroad Company, defendant [appellant], a tariff lawfully on file with the Interstate Commerce Commission naming the rates and charges for such privileges or facilities" (R. 225).

Neither appellant nor any other railroad files or publishes, or has ever filed or published tariffs naming any separate, extra or special rates or charges for the use of their tracks, locomotives, cars or other facilities used in transporting shippers' goods, or specifying the type of service or the operating time schedule within which shipments will be moved.[5]

In addition to tariff publication of their rates, fares and charges for transportation and terminal, storage and

5 Prospective shippers or passengers generally obtain information concerning railroad train schedules and service at local railroad freight or passenger offices or stations. While railroads generally have all such information compiled and printed in pamphlet form for dissemination to the public, such information has never been required to be published in tariffs or filed with the Commission. These pamphlets are commonly called "timetables" and railroad passengers, for example, are familiar with the custom of railroads in maintaining passenger "timetables" not only in their ticket offices but in their trains and at public information desks in hotels and other places for the convenience of prospective passengers. The railroads also print pamphlets of their freight train schedules, service and operation generally for the information of their operating employees and traffic solicitors, from whom prospective freight shippers readily obtain information concerning freight train schedules, service and other freight transportation information, without the inconvenience of searching for it in published tariffs.

icing charges expressly named, section 6(1) requires railroads to publish "all other charges which the Commission may require."

But there is no provision of law requiring, nor has the Commission ever ordered railroads to specify in their tariffs separate, special or additional rates or charges for the use of their tracks, locomotives, cars or other facilities used in transporting shippers' goods or to publish in tariffs the schedules or "running time" of their trains; or to run one train or to move one shipment no slower or faster than another, or to publish a separate, additional or special charge for slower or faster movement of passengers or goods; or to prevent railroads from adjusting their schedules or train service in an effort to compete with other railroads, or to meet the requirements of commercial marketing and distributing methods.

THE DISTRICT COURT'S DECISION

Although it is undisputed that appellant collects and retains the full published tariff lumber rates on file with the Commission, the district court held that appellant's slow service constitutes a device for the granting of rebates and concessions, advantages and discriminations in violation of the Elkins Act, whereby shippers of "roller" lumber obtain transportation of their shipments at less than the published rates on file with the Commission; and that the slow service extends to shippers privileges and facilities not specified in published tariffs in violation of section 6(7) of the Act (R. 219-220).

Notwithstanding the decision so made and the injunction to enforce it, the court apparently recognizing that it was dealing with problems within the primary jurisdiction of the Commission, held (R. 219):

"It is the function of the Interstate Commerce Commission to determine whether or not a delay in service is reasonable under all the facts and circumstances involved. Perhaps in certain instances, a delay in service would be reasonable in order to meet the competition of competing carriers with longer physical routes. * * *"

"This Court wants it to be clearly understood that it is not hereby holding that the 14-day delay in service now being practiced by the defendant is unreasonable. * * *."

Thus, although refusing to dismiss the Complaint or remand the case to the Commission despite its recognition that it was not its judicial function to determine the lawfulness or "legal quality" of the slow service, the court nevertheless enjoins the slow service as in violation of law, subject, however, to a possible determination by the Commission that the slow service is "reasonable." This apparently means that if the Commission, though without remand, should determine the slow service to be "reasonable" then the court was wrong in holding that the service violates the Elkins Act and section 6(7) of the Interstate Commerce Act, and that such determination by the Commission would overrule, set aside or supersede the court's decision and injunction.

SUMMARY OF ARGUMENT

I.

As the performance of slow lumber service is not limited to appellant alone but is similarly practiced by nearly all western railroads that compose direct routes in their efforts to compete at equal rates with circuitous routes nearly twice as long as the direct routes, obviously the problem is not susceptible to judicial solution and certainly not by judicial process against this appellant alone. The injunction, if affirmed, would exclude this appellant from the slow lumber traffic while all other railroads would be free to perform that service, and the purpose of Congress to obtain uniformity in practices among railroads would fail. Since the Commission is the only tribunal which has authority to prescribe and require desirable uniformity in practices and services of all railroads performing slow lumber service, it is plain that the district court should have dismissed the Complaint and remanded the case to the Commission for full investigation of the rates and practices in performance of slow lumber service by the circuitous routes, as well as the direct routes, and for such order, if any, as the Commission might deem necessary.

Whether appellant's offering and performing two types of service, i. e., a fast service and a slow service, for all shippers alike and for the same published tariff rates without describing or specifying either service in published tariffs and without making an extra charge for slow service renders the slow service a violation of section 6(7) of the Interstate Commerce Act and section 1 of the Elkins Act, presents, among others, the following fundamental preliminary administrative questions of fact, determination of which is plainly within the Commission's exclusive primary jurisdiction under the Act:

1. whether the published tariff rates collected and retained by appellant are just and reasonable for both the fast and the slow service (section 1(5));

2. whether appellant's performance of both services at the same published tariff rates is a just and reasonable "practice" (sections 1(6) and 15(1));

3. whether appellant's performance of both fast and slow service for all shippers alike at their request for the same published tariff rates is a discrimination against shippers who do not request slow service and a concession or advantage to shippers requesting slow service (sections 2 and 3);

4. whether, since there is no provision of law and the Commission has never issued any order, rule or regulation expressly requiring publication of railroad operating schedules or types of service in published tariffs, appellant's performance of slow service at published tariff rates for all shippers alike, but without description of either the fast or the slow service in published tariffs, renders the slow service a "privilege" not specified in the tariffs within the prohibition of section 6(7) of the Act;

5. whether the prohibition in section 6(7) against any carrier refunding any portion of the rates, fares and charges specified in its tariffs, or extending to any shipper any privileges "except such as are specified in such tariffs", automatically renders appellant's slow service (but not its fast service) unlawful because it is not offered in tariffs published and filed with the Commission.

This Court has consistently held that such questions are questions of fact for the determination of which Congress created the Commission in order to obtain "desirable uniformity" which could not be obtained if the num-

erous Federal courts attempt to decide them (cases cited, *Infra*, pp. 26-38).

As neither the Interstate Commerce Act nor the Elkins Act expressly prohibits or condemns as unlawful the performance of either a slow or a fast service for the same rate or charge, and since appellant admittedly collects and retains the full published tariff rate for both types of service, its slow service may *not*, like a "rebate" [which both Acts expressly prohibit], be condemned, "as a thing *ipso facto* illegal and prohibited by the statute"; and since the "legal quality" of the slow service has not—like a rebate or refund to a shipper of a part of the tariff rate—been "definitely fixed by the statute," so, performance of the slow service, "otherwise permissible, is lawful or unlawful, according as it is reasonable or unreasonable," or, in fact, brings about a "discrimination," "advantage", or some other result expressly prohibited by the Act; but to determine such questions involves consideration and comparison of many and various facts and calls for the exercise of the discretion of the Commission. The courts have not been given jurisdiction to fix rates or practices in direct proceedings, nor can they do so collaterally during the progress of a lawsuit (*Infra*, p. 29).

The district court held appellant's slow service unlawful because of the court's basic findings that the slow service contributes "trackage and cars to provide a storage facility" and results in "freight car shortages" and in "additional need for power and working crews," in "excessive per diem cost" to appellant, to the "economic disfavor" of appellant and "detriment of the national policy to maintain economically stable transportation facilities," and to give "advantages" to certain shippers, placing them in "a superior competitive position in the marketing of lumber."

Clearly the district court usurped the administrative functions of the Commission in making these findings of fact and in refusing to dismiss the Complaint and remand the case to the Commission for its own investigation and determination of these facts and issuance of such order, if any, as the Commission might deem necessary.

And, since any order, rule or regulation issued by the Commission as the result of such investigation would be subject to independent judicial review by a specially constituted Federal district court, thus rendering any further court proceedings on the Complaint futile and useless, the district court was clearly required by decisions of this Court to dismiss the Complaint. (Cases cited, *Infra*, pp. 30-39.)

The reasons suggested by the Government in its Motion to Affirm, in attempted justification of the district court's refusal to dismiss the Complaint and remand the matter to the Commission, are without merit or have been considered and rejected in the above decisions by this Court. (*Infra*, pp. 40-45.)

II.

Appellant's performance for all shippers at the same published tariff rate of either a fast or a slow service as elected by the shipper, without tariff specification of operating schedules or time consumed in transit by either type of service and without extra charge for the slow service, does not render the slow service violative of section 6(7) of the Interstate Commerce Act or section 1 of the Elkins Act.

The Government's case and the decision below are bottomed on the postulate that the law prohibits railroads from performing two types of service—fast or slow—for the same published tariff rate. No provision of law nor any order, rule or regulation of the Commission is cited as the

basis for that postulate, and there is none. Instead, it is the result of the following rationale: "It is necessarily implicit in the tariffs that the rates apply to the carrier's 'normal' service" (Motion to Affirm, p. 7); appellant's fast service is its "normal" service and is, therefore, the only service that may lawfully be furnished for the published tariff rates; therefore, slow service and any service other than the fast or "normal" service is a "special service" and may not be lawfully performed for the published tariff rates; although "regular operating schedules are not required to be filed" specifying or offering fast or "normal" service, no service other than the fast or "normal" service may be lawfully performed unless it is specified or offered in published tariffs on file with the Commission naming an extra charge in addition to the published tariff rates for such "special service."

While the court below does not explicitly adopt the Government's "standard" that any service other than fast or "normal" service is unlawful, but by enjoining appellant from performing any lumber freight service whereby lumber shipments are "intentionally delayed", the court indirectly adopts the Government's postulate that only fast or "normal service" may be lawfully performed under the published tariff rates. The court adopts "intentional" slow service as a "standard" of unlawfulness and condemns appellant's slow service, because it is intentionally slower than its fast service, while the Government adopts fast service as "normal" and as the only service which may be performed at the published tariff rates. Although employing different word technique the Government and the court arrive at the same conclusion, namely, that any service which is intentionally slower than appellant's fast service is *ipso facto* unlawful unless specified in appellant's published tariffs and an extra charge made for it. Neither of these newly invented but wholly erroneous and untenable "standards" could be employed in railroad oper-

ation. What is "normal" service for one type of traffic under one set of circumstances would not be "normal" for other traffic or for the same traffic under different circumstances. Every operating schedule is necessarily "intentional" and is made in an effort to meet the necessities of competitive railroad operation and the needs of the traffic under the circumstances offered by shippers.

But the Act does not set up a "standard" of service to be performed for the published tariff rates; it does not specify or define "normal" service; and in fact it does not specify or mention any type or the quantum of service that may be performed for the published tariff rates. Neither counsel for the Government nor the court below is at liberty to set up a "standard" of service, when the Act itself does not, and to proceed from such invented "standard" to condemn as unlawful whatever service they consider as departing from their standard of "normal" service. Railroads have always offered, without objection by the Commission, variable operating schedules or types of service for the same published tariff rates, and without publishing the schedules in tariffs. If, as the injunction requires, they are to be prevented from doing so they will be prohibited from adjusting their schedules and operations—both freight and passenger—to the requirements of sensible and economic operating requirements and to the varying needs and desires of the public. For example, the railroads would be compelled to transport "dead" freight (including lumber) in as fast service as that performed in transporting perishable California fruits and vegetables to the East in fast service to meet the needs of California producers and of eastern markets and consumers.

Moreover, whichever service counsel for the Commission, the Government or a district court might select as "normal" would amount to an automatic condemnation as unlawful all other services unless specified and offered in

published tariffs at an extra charge in addition to the rates for the selected "normal" service. No longer could transcontinental railroads provide at the same published tariff rates three different schedules or types of passenger train service between the East and the Pacific coast unless they made an extra charge for services other than the service selected by the Government or a court as "normal." Depending upon their judgment or whim, "normal" service could be either a fast, an intermediate or a slow service. Indeed, they attempt to support the decision below by citing *Chicago & Alton R. R. Co. v. Kirby*, 225 U. S. 155, in which slow service was treated as "normal" and special fast service for one shipper was condemned as unlawful.

There is no provision of law and no order, rule or regulation of the Commission expressly prohibiting railroads from offering and performing for all shippers, including lumber shippers, either a slow or a fast service for the same tariff rate, or requiring railroads to operate all of their trains or to move all traffic over their lines at the same speed or within the same running time; and there is no law or any order, rule or regulation by the Commission expressly requiring railroads to file with the Commission tariffs specifying operating schedules or the time within which they expect to move shipments over their lines; and there is no law or order, rule or regulation by the Commission requiring railroads to publish in tariffs and collect in addition to regular line-haul tariff charges any separate, additional or special charge for performing a slow or a fast service.

Neither appellant nor any other railroad has ever published in tariffs their operating time schedules or information concerning the type service offered or time consumed in transit for shipments moved at published tariff rates (see footnote 5, p. 14, *ante*). Although section 6(1)

of the Interstate Commerce Act requires railroads to publish their rates and charges for transportation between points on their lines "and all other charges which the Commission may require" and privileges or facilities which affect the aggregate of such rates and charges or the value of the service, the Act does not require and the Commission has no authority to require railroads to file tariffs specifying their operating schedules or to make an extra charge for a slow or a fast service, unless and until it finds after hearing upon evidence that the published rate is not reasonable or lawful for one or the other or both types of service. Indeed publication of such operating information in tariffs and the exaction of such extra charges for different types of service have never been required or suggested by the Commission in the entire 73 years of its existence until the present case. This is the first time in history that any contention has been made that a rate which is "reasonable" for a "normal" service automatically becomes unreasonably low, thus requiring an additional charge or a higher rate, for performance of a service that is either faster or slower than a so-called "normal" service.

None of the court decisions cited by the Government and the court below (discussed *infra*, pages 59-62), involved facts or circumstances comparable to those in the case at bar and none of them affords a basis or support for the decision below.

ARGUMENT

PREFATORY

It is appellant's position and contention that its offering and performing for all shippers at the same published tariff rate either a fast or slow service as elected by the shipper without tariff specification of operating schedule or time consumed in transit by either type service does not violate section 6(7) of the Interstate Commerce Act

or section 1 of the Elkins Act, but that whether its slow service does violate those acts raises questions that are not judicial but are questions of fact within the primary administrative jurisdiction of the Commission.

Appellant further contends that the problems raised by the Complaint herein, and attempted to be but not solved by the district court, are not susceptible to judicial solution, and certainly not by judicial process against this appellant alone, for the question whetner a railroad violates the law in performing the two types of service without tariff publication for the same published tariff rates is not limited to appellant alone but is a question involving similar practices by all western railroads that compose direct routes which perform slow service in transporting lumber in their efforts to compete at equal rates with long circuitous routes, and even by some of the circuitous routes. See *Regulations for the Movement of Loaded Freight Cars*, 298 I.C.C. 371, 376.

As the injunction issued by the district court enjoins only the appellant, Union Pacific, from performing slow lumber service, its effect, if affirmed by this Court, is to exclude only Union Pacific direct routes from participating in the "roller" lumber traffic while the numerous other railroads forming other direct routes, not being bound by the injunction, would be free to continue performing the slow lumber service in their efforts to compete with the long circuitous routes. If the Government should bring suits for injunctions against each of the numerous other railroads in the several Federal district courts having jurisdiction over particular railroads; those courts, not being bound by the district court in the instant case, might well disagree with the district court below as to the legality of

the practices of other railroads that compete with this appellant for the "roller" lumber traffic, and the purpose of Congress to obtain uniformity in practices among railroads would fail, *Texas & Pac. Ry. v. Abilene Cotton Oil Co.*, 204 U. S. 426, 439-441. And if, as would be quite unlikely, all of the district courts should agree with the court below and issue injunctions enjoining all of the railroads forming the direct routes from performing slow lumber service unless they exacted extra charges for it, then all of the "roller" lumber traffic would be lost to the direct routes, for, as occurred during the life of the Commission's Service Order No. 910, the "roller" lumber shippers would route their lumber traffic over the long circuitous but cheaper routes (R. 146).

Thus, as will be presently demonstrated, not only are the questions raised in this suit within the primary administrative jurisdiction of the Commission, but also the judiciary is helpless to resolve the whole problem, and the Commission is the one and only tribunal that might bring about the "desirable uniformity" in the application of interstate rates and in the practices of competing railroads which Congress intended to effectuate, *United States v. Western Pac. R. Co.*, 352 U. S. 59, 64.

Appellant submits that the Commission has dealt with the competing railroad routes, rates and service in the transportation of lumber from the Northwest in such "piecemeal" manner as to create chaos and confusion instead of the "desirable uniformity" which it is the function of such a specialized agency to effectuate. The Commission has, under section 13(2) of the Act, "full authority and power at any time to institute an inquiry, on its own motion, in any case and as to any matter or thing * * *

concerning which any question may arise under any of the provisions of this part, or relating to the enforcement of any of the provisions of this part * * * [and] to make and enforce any order or orders in the case, or relating to the matter or thing concerning which the inquiry is had * * *." This Court said in *General American Tank Car Corp. v. El Dorado T. Co.*, 308 U. S. 422, at pages 432-433:

> "* * * The policy of the Act is that reasonable allowances and practices, which shall not offend against the prohibitions of the Elkins Act, are to be fixed and settled after full investigation by the Commission, and that there is remitted to the courts only the function of enforcing claims arising out of the failure to comply with the Commission's lawful orders."

Instead of conducting such "full investigation" to obtain the "desirable uniformity" among the numerous railroads by determining a fair, competitive relationship as to rates and service between the long circuitous routes and the shorter direct routes of this appellant and other participants in direct routes, the Commission has taken the following "piecemeal" steps:

1. By granting rate relief from section 1 of the Act for lumber traffic from the Northwest the Commission itself approved many of the long circuitous routes to compete at equal rates with the shorter direct routes, including the route of this appellant, *Commodity Rates on Lumber and Other Forest Products*, 151 I.C.C. 763; 165 I.C.C. 561.

2. Purporting to relieve an alleged freight-car shortage existing "in all sections of the country" the Commission, exercising its emergency car service powers under section 1(15) of the Act (App., p. 2), issued on March 19,

1956, its Service Order No. 910 which became effective June 13, 1956, prohibiting the railroads from wilfully delaying the movement of loaded freight cars for the purpose of increasing the time in transit (R. 65, 67). In a report dated April 13, 1956, entitled Service Order No. 910 — *Regulations for the Movement of Loaded Freight Cars*, 298 I.C.C. 371, it appears that the Service Order was aimed particularly at slow movement of "roller" lumber by numerous railroads. However, Service Order No. 910 was vacated by the Commission, effective December 8, 1956, manifestly because the emergency no longer existed in car supply. Appellant, of course, complied with the Service Order and lost gross revenues of more than $500,000 during the first month the order was effective because the "roller" lumber traffic was routed by shippers to the longer circuitous routes (R. 146).

3. After Service Order No. 910 was vacated appellant, and presumably all the other railroads that had previously performed slow service, reinstated its slow lumber service effective December 8, 1956 (R. 159), after which the Commission's agents obtained information from appellant's files concerning its slow lumber service, and the United States filed the Complaint herein December 23, 1957, alleging appellant's slow lumber service violated section 1 of the Elkins Act and section 6(7) of the Interstate Commerce Act in that, among other allegations, the slow service was performed "without charge and not pursuant to specific tariff provision" (R. 4), despite the fact, as the Commission well knew, that appellant charges, collects and retains the published tariff rates, and that no law, nor any order, rule or regulation by the Commission requires any extra charges for the slow service or any tariff provision offering to perform it.

4. After this suit was filed some six other railroads (not including this appellant) filed tariffs with the Commission proposing to hold "roller" lumber shipments at specified points en route 15 days free of demurrage. The Commission promptly suspended all of those tariffs, conducted hearings with respect to their lawfulness and issued its report dated July 31, 1959, entitled Investigation and Suspension Docket No. 7050, *Lumber—Free Time Allowance at Hold Points* (not yet officially reported), holding the tariffs to be unlawful and ordering that they be canceled.[6] But the Commission did not prohibit the railroads, whose tariffs it ordered canceled, from continuing to perform slow lumber service without tariff specification of the service or an extra charge for it. Instead of suggesting or ordering any solution to bring about uniformity between all of the direct routes and the circuitous routes, many of which it had previously approved, the Commission merely held that the proposed tariffs were not "just and reasonable," and said that the circuitous routes entailed "disabilities not encountered when the lumber is moved over a more direct route" and that railroads participating in circuitous routes were "not prohibited from restricting their rates so as to apply only over such routes as they consider to be reasonable." This latter, as the Commission well knew, the circuitous-route carriers would not do because it would lessen their ability to divert the "roller" traffic to their lines from the shorter direct routes

6 On January 7, 1960, the Commission released an order dated December 21, 1959, granting petitions for reopening and reconsideration of this proceeding on the present record, postponing the effective date of its previous order. Any final order the Commission makes upon reconsideration will be subject to independent judicial review, and it is thus entirely possible that it may issue an order which could render futile and useless any further consideration of the instant case by this Court.

5. Instead of exerting its administrative powers and conducting full investigation of the slow service of all competing railroads with a view to effectuating "desirable uniformity" in the competitive relations between the shorter direct routes and the long circuitous routes, including those previously approved by it, the Commission requested the Department of Justice to institute this suit (and a similar suit against the Northern Pacific Railway Company in the District of Minnesota) and has now obtained from the district court an injunction, the only effect of which, unless reversed by this Court, will be to completely exclude appellant from participation in the "roller" lumber traffic, while all other railroads would be free to perform slow service for that traffic. While the district court suggests that appellant may free itself of the injunction by having in force "a tariff lawfully on file with the Interstate Commerce Commission naming the rates and charges for such privileges or facilities" [slow service] (R. 225), certainly the exaction of extra charges in addition to the regular line-haul rates charged for the slow service would preclude appellant from participating in the "roller" lumber traffic while all of the numerous other railroads are free to perform slow service at regular tariff rates with no additional charge for that service.

The following language from this Court's decision in *U. S. v. Chicago, M., St. P. & P. R. Co.*, 294 U. S. 499, at pages 509-510, is appropriate here:

> "* * * The whole situation is subject to the power of the Commission, * * *. * * * Under § 15 of the statute the Commission of its own motion may conduct a comprehensive inquiry into the rates of all the lines within the area of controversy, may fix the fair relation between one line and another, * * *.

"* * * The reproach of piecemeal action is incurred by the Commission, which has not adjudged the fairness of the relation now subsisting between Illinois and Indiana rates, which has not questioned its own capacity to prevent unjust reprisals, which has put off to an indefinite future the remodeling of the rate structure *for all the carriers affected*, and which has *left this particular carrier helpless in the interval*. In brief, a schedule of lowered tariffs has been canceled though the facts that control the validity of the reduction have yet to be determined. *This was not a full discharge by the Commission of an immediate responsibility*. It was inaction and postponement. Responsibility was shifted from the shoulders of the present to the shoulders of the days to come." (Italics added.)

I

THE COMPLAINT PRESENTS BASIC PRELIMINARY QUESTIONS OF FACT WHICH ARE WITHIN THE EXCLUSIVE PRIMARY ADMINISTRATIVE JURISDICTION OF THE INTERSTATE COMMERCE COMMISSION, AND THE DISTRICT COURT ERRED IN REFUSING TO DISMISS IT.

The Complaint presents basic preliminary questions of fact which are clearly within the exclusive primary jurisdiction of the Commission and its determination of those facts is prerequisite to a decision of the ultimate question presented by the Complaint, namely, whether appellant's offering and performing two types of service (i.e., a fast service and a slow service) for all shippers alike and for the same published tariff rates, without describing or specifying the slow service in the published tariffs and without making an extra charge for it, renders the slow service, *ipso facto*, a violation of section 6(7) of the Interstate Commerce Act and section 1 of the Elkins Act.

The ultimate allegation in the Complaint that appellant's slow service is unlawful is a mere conclusion of the lawyers who wrote the Complaint drawn from their basic

allegations that appellant's slow service is a device whereby "advantages" are given and "discriminations are practiced"; that the slow service without tariff publication is an unlawful extension of "privileges and facilities"; that the slow service contributes "trackage and cars to provide a storage facility" and results in "freight car shortages," in "additional need for power and working crews," in "excessive per diem cost" to appellant to the "economic disfavor" of appellant and "detriment of the national policy to maintain economically stable transportation facilities," and to give "advantages" to certain shippers, placing them in "a superior competitive position in the marketing of lumber." Appellant's answer denies those allegations (R. 18-19); and whether they are true or false depends upon findings of fact derived from evidence setting forth detailed and probative facts in particularity.

Thus, the basic and fundamental preliminary administrative questions are—

1. whether the published tariff rates admittedly collected and retained by appellant are "just and reasonable" for both the fast and the slow service performed by appellant, and that is a question of fact for the Commission's determination under section 1(5) of the Act;

2. whether appellant's performance of both services at the same published tariff rates and charges is a just and reasonable "practice," and that is a question of fact for the Commission's decision under sections 1(6) and 15(1) of the Act;

3. whether, in performing both fast service and slow service for all shippers alike at their request, for the same

published tariff rates and charges, appellant may be deemed guilty of "unjust discrimination," and that is a question of fact for the Commission's decision under section 2 of the Act;

4. whether performance of both fast and slow services for all shippers alike for the same published tariff rates and charges causes an "undue or unreasonable preference or advantage" or any "undue or unreasonable prejudice or disadvantage," and that is a question of fact for the Commission's decision under section 3 of the Act;

5. whether the slow service at published tariff rates for all shippers alike, but without description of the service in the published tariffs, in fact, constitutes "privileges" not specified in the tariffs within the prohibition of section 6(7) of the Act, and that is a question of fact for the Commission's decision under section 6(1) of the Act, which requires railroads to publish "all other charges which the Commission may require."

Determination of the foregoing questions is so plainly within the Commission's exclusive primary administrative jurisdiction as to make clear the duty of the district court to dismiss the Complaint and remand the case to the Commission; and, being informed that the practice of performing both a slow service and a fast service in transporting lumber at the same published tariff rates without tariff specification of either type service was not confined to this appellant alone, but was engaged in by practically all of the numerous western railroads forming the direct routes, the district court, *a fortiori*, should have dismissed the Complaint and remanded the case to the Commission to determine the administrative questions not alone with re-

spect to this appellant, but to order a full investigation and hearing of the entire subject and make determinations covering all of the railroads engaged in the same practice and to make such findings, decision and order, if any it deems necessary, to make effective "the desirable uniformity which would obtain if initially a specialized agency passed on certain types of administrative questions." *United States v. Western Pac. R. Co.*, 352 U. S. 59, 64. Since any order, rule or regulation issued or promulgated by the Commission as a result of such full investigation would be subject to independent judicial review by a specially constituted three-judge Federal court, pursuant to special statutory procedure prescribed in 28 U.S.C.A., §§ 1336, 1398, 2284, and 2321-2325, thus rendering any further court proceedings in this case futile and useless, decisions of this Court presently to be cited and discussed, clearly required the district court to dismiss the Complaint.

The situation here is practically identical to that in *U. S. Nav. Co. v. Cunard S. S. Co.*, 284 U. S. 474, in which the Complaint, brought to enjoin alleged violations of the antitrust laws, was dismissed on the ground that the matters complained of were within the exclusive administrative jurisdiction of the United States Shipping Board, under the Shipping Act of 1916. In that case a group of steamship lines by agreement among them charged a low rate to shippers who agreed to ship all of their traffic via the lines of the group but charged the regular and twice higher tariff rate to shippers who would not agree to ship all their traffic via the lines of the group. This and other concerted activities of the group were alleged to be in violation of the antitrust laws. Significantly, the carriers in that case charged two types of rates (low contract and high tariff) for the same service, while in the case at bar ap-

pellant charges one and the same rate for two types of (slow and fast) service. At page 480 this Court said:

> "It may be conceded that, looking alone to the Sherman Antitrust Act, the bill states a cause of action under §§ 1 and 2 of that act, and, consequently furnishes ground for an injunction under § 16 of the Clayton Act, unless the Shipping Act stands in the way; and this was the view of both courts below."

And at page 485 the Court held:

> "The act is restrictive in its operation upon some of the activities of common carriers by water, and permissive in respect of others. Their business involves questions of an exceptional character, the solution of which may call for the exercise of a high degree of expert and technical knowledge. Whether a given agreement among such carriers should be held to contravene the act may depend upon a consideration of economic relations, of facts peculiar to the business or its history, of competitive conditions in respect of shipping of foreign countries, and of other relevant circumstances, generally unfamiliar to a judicial tribunal, but well understood by an administrative body especially trained and experienced in the intricate and technical facts and usages of the shipping trade; and with which that body, consequently, is better able to deal. Compare *Chicago Board of Trade v. United States*, 246 U. S. 231, 238; *United States v. Hamburg-American S. S. Line*, 216 Fed. 971.
>
> "A comparison of the enumeration of wrongs charged in the bill with the provisions of the sections of the Shipping Act above outlined conclusively shows, without going into detail, that the allegations either constitute direct and basic charges of violations of these provisions or are so interrelated with such charges as to be in effect a component part of them; *and the remedy is that afforded by the Shipping Act, which to that extent supersedes the antitrust laws.*

> Compare *Keogh v. Chicago & N. W. Ry. Co., supra* [260 U. S. 156], at p. 162. The matter, therefore, is within the exclusive preliminary jurisdiction of the Shipping Board. The scope and evident purpose of the Shipping Act, as in the case of the Interstate Commerce Act, are demonstrative of this conclusion. * * *." (Italics added.)

As already stated, whether appellant's slow service is an "advantage," or a "discrimination," a "privilege" or "facility," are questions of fact, *Nashville Ry. v. Tennessee*, 262 U. S. 318, 322, and this Court has consistently held that the very purpose of the Congress in creating the Commission was to place the exclusive duty of deciding those facts in one Federal administrative tribunal having particular knowledge of complicated technical aspects of the regulation of railroad transportation. *Texas & Pac. Ry. v. Abilene Cotton Oil Co.*, 204 U. S. 426, 444.

In *United States v. Trucking Co.*, 310 U. S. 344, at pages 352-353, this Court held:

> "'It is not disputable that from the beginning the very purpose for which the Commission was created was to bring into existence a body which from its peculiar character would be most fitted to primarily decide whether from facts, disputed or undisputed, in a given case preference or discrimination existed' [citing *United States v. Louisville & Nashville R. Co.*, 235 U. S. 314, 320]. * * * The Interstate Commerce Act does not attempt to define an unlawful discrimination with mathematical precision. Instead, different treatment for similar transportation services is made an unlawful discrimination when 'undue,' 'unjust,' 'unfair,' and 'unreasonable.' *And the courts have always recognized that Congress intended to commit to the Commission the determination, by application of an informed judgment to existing facts, of the existence*

of forbidden preferences, advantages and discrimination." (Italics added.)

As neither the Interstate Commerce Act nor the Elkins Act expressly prohibits or condemns as unlawful the performance of either a slow service or a fast service for the same rate or charge, and since appellant admittedly collects and retains the full published tariff rate for both types of service, its slow service may *not*, like a "rebate" [which both Acts expressly prohibit] be condemned as "a thing *ipso facto* illegal and prohibited by the statute," *Mitchell Coal Co. v. Penna. R. R. Co.*, 230 U. S. 247, 261; and, since the "legal quality" of the slow service has not—like a rebate or refund to a shipper of a part of the tariff rate—been "definitely fixed by the statute," so, performance of the slow service, "otherwise permissible, is lawful or unlawful, according as it is reasonable or unreasonable" (Id., page 255), or, in fact, brings about a "discrimination," "advantage" or some other result prohibited by the Act.

> "* * * But to determine that question involves a consideration and comparison of many and various facts and calls for the exercise of the discretion of the rate-regulating tribunal. *The courts have not been given jurisdiction to fix rates or practices in direct proceedings, nor can they do so collaterally during the progress of a lawsuit when the action is based on the claim that unreasonable allowances have been paid.* If the decision of such questions was committed to different courts with different juries the results would not only vary in degree, but might often be opposite in character—to the destruction of the uniformity in rate and practice which was the cardinal object of the statute." (Id., 230 U. S. 255.) (Italics added.)

It has been the settled rule of this Court for more than 50 years that it is not the duty or function of the courts

to decide disputed questions that are "peculiarly within the province of the Commission," and that when such questions arise in court proceedings, it is the duty of the courts, "to remand the case to the Commission to enable it to perform that duty," *Texas & Pac. Ry. v. Abilene Cotton Oil Co.*, 204 U. S. 426, 444 (1907).

The rule was restated and applied and its basis explained in the *Cunard* case, *supra*, which, as we have shown, involved the interplay between court and administrative agency functioning under the antitrust laws, on the one hand, and the Shipping Act of 1916, on the other hand. At pages 480-481 the Court said:

> "The Shipping Act is a comprehensive measure bearing a relation to common carriers by water substantially the same as that borne by the Interstate Commerce Act to interstate common carriers by land. When the Shipping Act was passed, the Interstate Commerce Act had been in force in its original form or in amended forms for more than a generation. Its provisions had been applied to a great variety of situations, and had been judicially construed in a large number and variety of cases. *The rule had become settled that questions essentially of fact and those involving the exercise of administrative discretion, which were within the jurisdiction of the Interstate Commerce Commission, were primarily within its exclusive jurisdiction, and, with certain exceptions not applicable here, that a remedy must be sought from the Commission before the jurisdiction of the courts could be invoked.* In this situation the Shipping Act was passed. In its general scope and purpose, as well as in its terms, that act closely parallels the Interstate Commerce Act; and we cannot escape the conclusion that Congress intended that the two acts, each in its own field, should have like interpretation, application and effect. * * *." (Italics added.)

Explaining the reason for the rule, the Court further said at page 482:

> "* * * In all such cases the uniformity which it is the purpose of the Commerce Act to secure could not be obtained without a preliminary determination by the commission. Preliminary resort to the commission is required because the enquiry is essentially one of fact and of discretion in technicial matters; and uniformity can be secured only if its determination is left to the Commission. Moreover, that determination is reached ordinarily upon voluminous and conflicting evidence, for the adequate appreciation of which acquaintance with many intricate facts of transportation is indispensable; and such acquaintance is commonly to be found only in a body of experts. * * * "

The Court, then, at page 483, cited the following cases and circumstances in which it had applied the rule:

> "So the rule has been applied where recovery was sought by a shipper for unreasonable and excessive freight rates not found to be unreasonable by the Commission, *Texas & Pac. Ry. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426; where the question was as to the reasonableness of the carrier's practice in distributing cars, *Midland Valley R. Co. v. Barkley*, 276 U. S. 482; where the reasonableness of a particular practice of routing was involved, *Northern Pacific Ry. Co. v. Solum*, 247 U. S. 477, 483; where the continuance of service on an industrial track was assailed as unduly discriminatory, *Western & Atlantic R. Co. v. Public Service Comm.*, 267 U. S. 493, 497, and where an action was brought under § 7 of the Antitrust Act, based upon an alleged conspiracy among carriers to fix rates, *Keogh v. Chicago & N. W. Ry. Co.*, 260 U. S. 156. In the case last cited, it was pointed out (p. 163) that if a shipper were permitted to recover under the Antitrust Act, the amount recovered might, like a rebate, operate to give him a preference over his trade competitors. Uniform treatment would not result, even

if all sued, unless the highly improbable happened, and the several juries and courts gave to each the same measure of relief.'"

The rule thus stated and explained has been reiterated in a long and undeviating line of this Court's decisions.[7]

It is a compelling fact that one of the cases, *Northern Pacific Ry. Co. v. Solum*, 247 U. S. 477, cited by the Court in the language last quoted, involved a question identical to one of the questions the Complaint here asked the district court to decide, namely, whether appellant's use of the longer of its two lines into Council Bluffs is unlawful (see Complaint, paragraph "4", R. 3).

In the *Solum* case the Northern Pacific had *two* lines between the same points, namely, an intrastate line over which a lower coal rate applied, and an interstate line over which a higher rate applied. For economical operation the Northern Pacific moved outbound shipments from Duluth over the interstate line and collected the higher rate. Solum sued in a state court for the difference between the higher interstate rate collected and the lower rate applicable over the intrastate line. At page 481, this Court observed:

> "* * * The objection that the court lacked jurisdiction to entertain the proceeding was not made in the answers in the trial court; but it was insisted upon before the Supreme Court of Minnesota; was considered and overruled by that court (133 Minnesota, 93, 97); and is available here."

---

7 See *Manufacturers Ry. Co. v. United States*, 246 U.S. 457, 481; *Pennsylvania Co. v. United States*, 236 U.S. 351; *Seaboard Air Line Ry. Co. v. United States*, 254 U.S. 57, 62; *Penna. R.R. Co. v. International Coal Co.*, 230 U.S. 184, 196; *Mitchell Coal Co. v. Penna. R. R. Co.*, 230 U.S. 247, 255; *Nashville Ry. v. Tennessee*, 262 U.S. 318, 322; *Los Angeles Switching Case*, 234 U.S. 294, 311; *Board of Trade v. United States*, 314 U.S. 534, 546; *General American Tank Car Corp. v. El Dorado T. Co.*, 308 U.S. 422, 432-433; *El Dorado Oil Works v. U.S.*, 328 U.S. 12, 17; *United States v. Western Pac. R. Co.*, 352 U.S. 59, 62-70.

At pages 482-483 the Court held:

"* * * Whether the practice of the carrier of shipping over the interstate route was reasonable, when a lower intrastate route was open to it, presents an administrative question, one of perhaps considerable complexity.

"The Railway contends that, since the administrative question upon which its liability depends involves the reasonableness of a practice in interstate commerce and the traffic actually moved in interstate commerce, the court had no jurisdiction to adjudicate the controversy until that administrative question had been determined by the Interstate Commerce Commission. The shipper, on the other hand, urges that the rule which requires such preliminary determination of administrative questions by the Commission applies only to those cases where the question involved is whether a particular rate is unreasonable or whether a particular practice is discriminatory. But the rule is not so limited. It applies, likewise, to any practice of the carrier which gives rise to the application of a rate. *Texas & Pacific Ry. Co. v. American Tie & Timber Co.*, 234 U. S. 138, 147; *Pennsylvania R. R. Co. v. Puritan Coal Co.*, 237 U. S. 121, 131; *Pennsylvania R. R. Co. v. Clark Brothers Coal Mining Co.*, 238 U. S. 456, 469. * * *"

Sustaining the Northern Pacific's jurisdictional contention, the Court, at page 484, applied—

"* * * the rule, that the courts may not be resorted to until the administrative question has been determined by the Commission. * * *."

In *Director General v. Viscose Co.*, 254 U. S. 498, the Director of Railroads published and filed with the Commission a tariff supplement proposing to cancel on 30 days' notice the classification and freight rate on artificial silk so as to include it among articles that would *not* be

accepted for shipment. Before the supplement became effective, Viscose obtained from a United States District Court an injunction restraining the Director from putting the supplement into effect refusing to accept artificial silk for shipment. On appeal, the Circuit Court of Appeals certified to this Court the question:

> "'Did the District Court have jurisdiction to decide the matter raised by the complainant's bill and thereupon to annul the said action of the Director General of Railroads and enjoin the carriers from complying therewith?'"

Holding, at page 503, that the facts "presented a question for decision within the exclusive initial jurisdiction of the Interstate Commerce Commission," this Court concluded that the District Court was without jurisdiction, saying, at page 504:

> "The importance to the commerce of the country of the exclusive, intial jurisdiction which Congress has committed to the Interstate Commerce Commission need not be repeated and cannot be overstated (*Texas & Pacific Ry. R. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426; *Baltimore & Ohio R. R. Co. v. Pitcairn Coal Co.*, 215 U. S. 481; *Morrisdale Coal Co. v. Pennsylvania R. R. Co.*, 230 U. S. 304; *Minnesota Rate Cases*, 230 U. S. 352; *Texas & Pacific Ry. Co. v. American Tie Co.*, 234 U. S. 138, 146; *Pennsylvania R. R. Co. v. Clark Coal Co.*, 238 U. S. 456, 469, and *Loomis v. Lehigh Valley R. R. Co.*, 240 U. S. 43, 49); and, concluding, as we do, that this case falls plainly within that jurisdiction, the question asked by the Circuit Court of Appeals must be answered in the negative.
>
> "*Question answered, No.*"

The rule requiring dismissal of the instant case was succinctly stated and again applied by this Court in its

recent (1952) decision in *Far East Conf. v. United States*, 342 U. S. 570, upon facts and circumstances which make that decision a perfect and compelling authority for dismissal of the Complaint in the case at bar. In that case, as in the *Cunard* case, *supra*, a group of steamship lines maintained by agreement among themselves a "dual-rate" system, namely, a low rate for shippers who agreed to use ships of the Conference members exclusively, and a higher rate for shippers who did not agree to such exclusive patronage. There, as in the *Cunard* case, *supra*, the carriers charged two different rates for one and the same service, while in the case at bar appellant performs either of two types of service (slow or fast) for one and the same rate.

The United States sued to enjoin the "dual-rate" system on the ground that it violated the Sherman Antitrust law [26 Stat. L. 209]. The defendants moved to dismiss the complaint—

> "* * * on the ground that the nature of the issues required that resort must first be had to the Federal Maritime Board before a District Court could adjudicate the Government's complaint. * * *." (Page 572.)

The District Court denied the motion to dismiss. This Court granted certiorari and reversed.

Citing the *Cunard* case, *supra*, the Court said, page 573: "That case answers our problem," and after quoting from the decision in that case, the Court said, at pages 574-575:

> "The Court thus applied a principle, now firmly established, that in cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion,

agencies created by Congress for regulating the subject matter should not be passed over. This is so even though the facts after they have been appraised by specialized competence serve as a basis for legal consequences to be judicially defined. Uniformity and consistency in the regulation of business entrusted to a particular agency are secured, and the limited functions of review by the judiciary are more rationally exercised, by preliminary resort for ascertaining and interpreting the circumstances underlying legal issues to agencies that are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure.

"It is significant that this mode of accommodating the complementary roles of courts and administrative agencies in the enforcement of law was originally applied in a situation where the face of the statute gave the Interstate Commerce Commission and the courts concurrent jurisdiction. * * *."

At page 576, the Court said:

"The sole distinction between the *Cunard* case and this is that there a private shipper invoked the Antitrust Acts and here it is the Government. This difference does not touch the factors that determined the *Cunard* case. The same considerations of administrative expertise apply, whoever initiates the action. The same Antitrust Laws and the same Shipping Act apply to the same dual-rate system. To the same extent they define the appropriate orbits of action as between court and Maritime Board."

Pointing out that the order of the Board upon its consideration and decision of the question whether the "dual-rate" system was unlawful would be subject to special judicial review, the Court held that the complaint should be dismissed, explaining at pages 576-577:

"Having concluded that intial submission to the Federal Maritime Board is required, we may either order the case retained on the District Court docket pending the Board's action, *General American Tank Car Corp. v. El Dorado Terminal Co.*, 308 U. S. 422, 432-433; *El Dorado Oil Works v. United States*, 328 U. S. 12, 17; see *United States v. Interstate Commerce Commission*, *supra* [337 U. S. 426], at 465, n. 12, or order dismissal of the proceeding brought in the District Court. As distinguished from the situation presented by the first *El Dorado* case, *supra*, which was a contract action raising only incidentally a question proper for initial administrative decision, the present case involves questions within the general scope of the Maritime Board's jurisdiction. Shipping Act of 1916; §§ 14, 15, 39 Stat. 728, 733, 46 U. S. C. §§ 812, 814. An order of the Board will be subject to review by a United States Court of Appeals, with opportunity for further review in this Court on writ of certiorari. Pub. L. No. 901, 81st Cong., 2d Sess., §§ 2, 10, 64 Stat. 1129, 1132. If the Board's order is favorable to the United States, it can be enforced by process of the District Court on the Attorney General's application. 39 Stat. 728, 737, 46 U. S. C. § 828. We believe that no purpose will here be served to hold the present action in abeyance in the District Court while the proceeding before the Board and subsequent judicial review or enforcement of its order are being pursued. A similar suit is easily initiated later, if appropriate. Business-like procedure counsels that the Government's complaint should now be dismissed, as was the complaint in *United States Navigation Co. v. Cunard Steamship Co.*, *supra*."[8]

---

8 This Court's decision, May 19, 1958, in *Maritime Board v. Isbrandtsen Co.*, 356 U.S. 481, does not impair but is fully consistent with the decisions and disposition of the *Cunard* and *Far East Conference* cases. Indeed, at page 496, the Court said, "[a] reading of those opinions immediately refutes any suggestion either that this issue was expressly decided in those cases or that our holding here is not fully consistent with the disposition of those cases."

The most recent application by this Court of the rule which requires dismissal of the case at bar was in *Boston & Maine Railroad v. U. S.*, 358 U. S. 68, decided Nov. 17, 1958. There, the Interstate Commerce Commission had issued a declaratory order that rates of *per diem* charged by long-line railroads for use of their freight cars were "not in excess of reasonable compensation." In a suit to enjoin the order a three-judge district court held that the Commission should give more thorough consideration to "a mileage factor" in determining whether the car *per diem* was reasonable, and set aside the order. After an appeal was filed in this Court the Commission filed a memorandum with the Court expressing its readiness to proceed with further consideration in accordance with the district court's suggestion. In dismissing the appeal the Court explained at pages 71-72:

> "* * * As a result, we find the question raised by No. 310—whether the Commission has adjudicatory jurisdiction to determine a rate of uniform application throughout the industry or must engage in what the District Court characterized as the 'full scale investigation' accompanying promulgation of a rule under § 1(14)(a)—prematurely presented for decision. The Commission here recognizes that 'further investigation' and 'more detailed findings' will be requisite to compliance with the District Court's remand. Should such proceeding lead the Commission to reconsider its estimate of the desirability of a *per diem* embracing a mileage factor, the result might well be not a declaration that the present *per diem* is just and reasonable but the establishment of a new rate. If, conversely, the Commission adheres to its original view, it will be in the light of new findings derived from its further investigation. In either event, the proceedings on remand may lose the characteristics of a § 5(d) declaration and take on those of a § 1(14)(a) rule-making

procedure, thereby causing the question now sought to be reviewed to disappear. As the Commission has appropriately observed, the record now presents what is essentially only 'an interim ruling.'

"'These considerations lead us to dismiss the appeal in No. 310 without prejudice to raising the 'adjudicatory' issue again, if it survives the further Commission proceedings. This also disposes of No. 322, which is a cross appeal by the long-haul roads challenging the scope of the District Court's review.

"*It is so ordered.*"

In that case and in the *Far East Conference* case, the Court proceedings were ended by dismissal because the further administrative proceedings would result in orders by the Commission and the Board, respectively, which orders would be subject to special judicial review, thus rendering further proceedings by the Court in the cases before it futile and useless. Likewise, in the case at bar, as we have already pointed out, the Commission's investigation upon remand will result in a decision, order, rule or regulation, if any be deemed necessary, by the Commission, which will also be subject to special judicial review, thus rendering further court proceedings in the case at bar futile and useless.

In the circumstances we submit that this Court should reverse the district court and remand the case to it with directions to dismiss the Complaint, and to remand the matter to the Commission for full investigation and hearings concerning the practices of all railroads performing both a fast and a slow service in transporting lumber at the same tariff rates without specification in published tariffs of either type service or an extra charge in addition to the published tariff rates.

The district court's decision and the Government's Motion to Affirm attempt upon three grounds to justify the court's refusal to dismiss the Complaint and to remand the matter to the Commission for full investigation and resolution of the administrative questions involved.

First, the Motion to Affirm at pages 12-13 argues that instead of usurping the Commission's administrative jurisdiction the decree below aids that jurisdiction by directing appellant to comply with the tariff already on file with the Commission and by enjoining appellant from offering slow services until it files another tariff specifically offering slow service and naming rates and charges for it so as to give the Commission an opportunity to pass upon its lawfulness. But the court clearly did not issue the injunction merely to enable the Commission to investigate the lawfulness of appellant's slow service. The Commission already had that power and duty, upon its own initiative, under sections 13(2) and 15(1) of the Interstate Commerce Act. Therefore, in the face of the Commission's plenary powers of investigation, it is idle for the Government to argue that the Commission requested that this suit be brought to have the court require appellant to invoke the primary jurisdiction of the Commission by filing a tariff providing for the challenged service. Instead of remanding the case to the Commission, the district court proceeded to make its own administrative findings that the slow service results in an "advantage" to shippers using it and "discrimination" against shippers who do not desire or use the slow service, and that the service constitutes "privileges or facilities" not specified in the published tariffs. On these administrative findings of fact the district court made conclusions of law (R. 219-222) condemning the slow service as violating section 1 of the Elkins Act and section 6(7) of the Inter-

state Commerce Act, and the decree enjoins the asserted violations.

Thus, despite the district court's recognition that it is the Commission's function to determine whether appellant's slow service is "reasonable," and the court's denial that its decision holds the service to be "unreasonable" (R. 219), the court clearly usurped the Commission's administrative function by making its own determination of the "legal quality" of the slow service, holding it to be unlawful and, by paragraph 1 of the injunction (R. 224), enjoining appellant from performing it. The very basis of the injunction necessarily lies in the court's own findings of fact, in effect, that appellant may not lawfully offer and perform for all shippers at their election either of two types of service (fast or slow) for the same published tariff rate. That determination and other questions embraced in it, namely, whether the tariff rate is a reasonable rate for both the fast and slow service and whether the service results in unlawful advantage to shippers electing it and in discriminations against shippers who do not desire the slow service, are matters clearly within the exclusive primary jurisdiction of the Commission. Appellant contends that it may lawfully perform either a fast or a slow service for the one rate named in its published tariffs on file with the Commission and that no law requires appellant to specify in its tariffs either the fast or the slow service, but that if the Commission believes otherwise it may, upon its own motion, conduct a full investigation, hearings and orders under the powers conferred by section 13(2) of the Act without the futile circumlocution of asking the Government to bring this suit for the purpose of having the district court order appellant to invoke the Commission's primary jurisdiction.

Second, the district court and the Government's Motion to Affirm assert that the rule of primary jurisdiction is not applicable in this case because the Elkins Act expressly empowers the courts to issue injunctions. But decisions of this Court hold that mere existence of such power in the courts is no excuse for their refusal to dismiss a case or to stay their hands and remand a case to the Commission which was especially created by Congress to determine whether rates, rules or practices of railroads result in unlawful advantages, discriminations or other prohibited results.

In *U. S. Nav. Co. v. Cunard S. S. Co.*, 284 U. S. 474, this Court affirmed the decree of the court of appeals (50 F. (2d) 83) which had affirmed a decree of the district court granting a motion to dismiss the complaint (39 F. (2d) 204). The dismissal was ordered on the ground that the matters set forth in the complaint, though stating a cause of action and furnishing ground for an injunction authorized by the antitrust laws, were also within the exclusive administrative jurisdiction of the United States Shipping Board under the Shipping Act of 1916. At page 480 the Court said —

> "It may be conceded that, looking alone to the Sherman Antitrust Act, the bill states a cause of action under §§ 1 and 2 of that act, and, consequently, furnishes ground for an injunction under § 16 of the Clayton Act, unless the Shipping Act stands in the way; and this was the view of both courts below."

Far East Conf. v. United States, 342 U. S. 570, was a suit brought by the Government to enjoin alleged violations of the antitrust laws. But this Court again ordered dismissal on the ground that the subject matter was within

the administrative jurisdiction of the Federal Maritime Board, to which preliminary resort was required. Thus, application of the rule of primary jurisdiction depends not upon whether the courts have power to issue an injunction, but upon the question whether the facts alleged present problems primarily within the jurisdiction of an agency especially created to make administrative determinations in a particular field.

At page 577 (see quotation, *infra*, page 37) this Court said—

> "* * * Business-like procedure counsels that the Government's complaint should now be dismissed, as was the complaint in *United States Navigation Co. v. Cunard Steamship Co., supra.*"

The similarity between the facts and circumstances in the instant case and the decisions and disposition by this Court of the *Cunard* and *Far East* cases is of compelling significance. In both of those cases the Court, though clearly having injunctive power, ordered the complaints dismissed, applied the rule of primary jurisdiction and refused to enjoin the steamship lines from charging two different rates for one type of transportation service, while in the instant case the district court refused to apply the rule of primary jurisdiction and enjoined appellant from performing two types of transportation service for one and the same rate. The Court's decisions in those cases clearly required the district court to dismiss the complaint in the instant case and remand the case to the Commission.

Concerning the applicability of the doctrine of primary administrative jurisdiction, the following test is stated in 3 Davis, Administrative Law Treatise, § 19.07, p. 39:

> "* * * The test is not whether some parts of the case are within the exclusive jurisdiction of the courts; the test is whether some parts of the case are within the exclusive jurisdiction of the agency. * * *."

Third, the decision below (R. 210) and the Motion to Affirm, pages 14-15, argue that the rule of primary jurisdiction is not applicable here because the Commission has "clarified" its views concerning "intentional delays of shipment to suit a shipper's needs." While the cases cited in support of that contention contain general language which, in its context, indicated that the Commission is generally opposed to such delays because it thinks they are not in the public interest or contribute to car shortages, none of the cases involved investigations, hearings, adjudications or determinations by the Commission of the administrative questions squarely presented and calling for decision by the Commission in this case. Certainly none of the cited cases constitutes a decision or a clarification of the question whether, for its own competitive needs as well as shippers' needs, this appellant's performance of two types of service for one published tariff rate, open to all shippers at their election, violates any provision of the Interstate Commerce Act or Elkins Act, or whether the published tariff rate is a reasonable rate for both fast and slow service, or results in unlawful advantages or discriminations.

A similar effort to prevent dismissal of the complaint and circumvent application of the rule of primary jurisdiction was made in the *Cunard* case and was rejected by both the court of appeals (50 F. (2d) 83, 90-91) and by this Court (284 U. S. 474) which said at pages 487-488:

> "Petitioner contends that the Shipping Board has already determined that an agreement similar to the

one here involved is unlawful under the Shipping Act, *Eden Mining Co. v. Bluefields Fruit & S. S. Co.*, 1 U.S.S.B. 41, and, therefore, that the courts may take jurisdiction of the case without further preliminary resort to the board. In support of this contention we are referred to *Mitchell Coal Co. v. Pennsylvania R. Co. supra* [230 U. S. 247], (see p. 257), and *National Pale Co. v. Chicago & N. W. Ry Co.*, 211 Fed. 65, 72. Without stopping to consider the general principle thus invoked, it is enough to say that the *Eden* case did not involve this agreement or these parties. * * *"

As we have just pointed out, none of the cases relied upon in the Motion to Affirm and by the court below to escape dismissal of the complaint and application of the rule of primary jurisdiction involved facts or circumstances at all comparable to those in the instant case, nor do they support or justify the district court's usurpation of administrative functions to decide whether, in order to compete with the long circuitous routes, many of which the Commission itself approved, appellant and other railroads forming shorter direct routes may perform a slow service for the same rate they charge for their fast service, or whether the rates charged are "reasonable" rates for both the fast and slow service or whether the performance of both services for the same rate, without specifying either service in published tariffs, results in any unlawful advantage or any forbidden discrimination. These basic questions and others already mentioned are clearly within the Commission's exclusive primary administrative jurisdiction.

This Court should direct the district court to dismiss the complaint and remand the case to the Commission with directions to investigate the practices of all railroads, including the circuitous routes as well as the direct routes,

with a view to effectuating desirable uniformity and fair competitive relations among all railroads participating in the "roller" lumber traffic.

II.

APPELLANT'S PERFORMANCE FOR ALL SHIPPERS AT THE SAME PUBLISHED TARIFF RATE OF EITHER A FAST OR A SLOW SERVICE AS ELECTED BY THE SHIPPER, WITHOUT TARIFF SPECIFICATION OF OPERATING SCHEDULE OR TIME CONSUMED IN TRANSIT BY EITHER TYPE OF SERVICE, AND WITHOUT EXTRA CHARGE FOR THE SLOW SERVICE, DOES NOT VIOLATE SECTION 6(7) OF THE INTERSTATE COMMERCE ACT OR SECTION 1 OF THE ELKINS ACT.

The Government's case and the decision below are bottomed on the postulate that railroads can not lawfully perform two types of service—fast or slow—for the same published tariff rate.

No provision of law nor any order, rule or regulation of the Commission is cited as the basis for that postulate, and there is none. Instead, it is reached by the following sheer assertions:

a. That "it is necessarily implicit in the tariffs that the rates apply to the carrier's 'normal' service" (Motion to Affirm, p. 7).

b. That appellant's fast service is its "normal" service and is, therefore, the only service or the quantum of service that may lawfully be furnished for the published tariff rates.

c. That, therefore, slow service and any service other than the fast or "normal" service is a "special service" and may not be lawfully performed for the published tariff rates.

d. That, although "regular operating time schedules are not required to be filed" specifying or offering fast or "normal" service, no service other than the fast or "normal" service may be lawfully performed

unless it is specified or offered in published tariffs on file with the Commission naming an extra charge in addition to the published tariff rates for such "special service."

Neither appellant nor any other railroad has ever published in tariffs their operating time schedules or information concerning the type service offered or time consumed in transit for shipments moved at published tariff rates. Such information is furnished shippers by the traffic and operating departments of railroads from information circulars similar to the familiar railroad passenger "time-tables" (*Infra*, page 14, footnote 5).

There is no provision of law and no order, rule or regulation of the Commission expressly prohibiting railroads from offering and performing for all shippers, including lumber shippers, either a slow or a fast service for the same tariff rate, or requiring railroads to operate all of their trains and to move all traffic over their lines at the same speed or within the same runing time; and there is no law or any order, rule or regulation by the Commission requiring railroads to file with the Commission tariffs specifying the running times or schedules of their trains or the time within which they expect to move shipments over their lines; and there is no law or order, rule or regulation by the Commission requiring railroads to publish in tariffs and collect, in addition to the regular line-haul tariff charges, any separate, additional or special charges for performing a slow or a fast service. Indeed, publication of such operating information in tariffs and the exaction of such extra charges have never been required or suggested by the Commission in the entire 73 years of its existence, until the present case.

The Complaint alleges (R. 5-6) and the district court finds (R. 201-202) that appellant's slow service without tariff publication and an extra charge is an unlawful extension of "privileges and facilities"; that the slow service contributes "trackage and cars to provide a storage facility" and results in "freight car shortages," in "additional need for power and working crews," in "excessive per diem cost" to appellant to the "economic disfavor" of appellant and "detriment of the national policy to maintain economically stable transportation facilities," and to give "advantages" to certain shippers, placing them in "a superior competitive position in the marketing of lumber." Appellant's answer denies those allegations; and whether they are true or false depends upon findings of fact derived from evidence setting forth detailed and probative facts in particularity.

Section 1(3)(a) of the Interstate Commerce Act defines the term "railroad" and also defines the term "transportation" as including locomotives, cars and "all instrumentalities and facilities of shipment or carriage," and section 1(4) makes it the duty of every common carrier subject thereto "to provide and furnish transportation upon reasonable request therefor. * * *." (App., p. 1.)

A railroad's compensation for providing the tracks, cars, locomotives and other facilities used in moving a shipper's goods from place to place and for the actual movement of them is obtained through complying with section 6(1) of the Act which requires railroads to file and publish tariffs showing "all the rates, fares and charges for transportation" between points on its own route and between points on its route and points on the routes of other railroads. (App., p. 3.)

In other words, the "rates, fares, and charges," which railroads are required to publish in tariffs and collect from shippers, are for *transporting* the shippers' goods, by means and through the use of the railroads' tracks, cars, locomotives and other facilities, from place to place, and performance of kindred service in connection with such movement.

The Act does not require railroads to publish in tariffs separate or additional rates or charges for the use of their *tracks, locomotives, cars* or other facilities used in performing the "transportation" which railroads are required to furnish.

Nor does the Act require railroads to publish tariffs showing the schedules or "runing time" of their trains, or to "hold out," promise or obligate themselves, through tariff publication or otherwise, to move goods or passengers between places within any particular or specified time, or to move all of their trains at the same speed or within the same "running time" or upon the same schedule; or to publish tariffs naming a special, additional or different charge for running one train, or moving one shipment faster or slower than another.

Although properly admitting that operating time schedules are not required to be filed in the tariffs, the Motion to Affirm argues that "expedited or delayed" service does require tariff specification and that it is immaterial that appellant offers through customary information memoranda and solicitors the two types of service equally to all shippers. Though arguing that published tariff rates necessarily apply only to "normal" service and that "expedited or delayed" service requires tariff specification as a departure

from "normal" service, the argument completely overlooks the fact that appellant renders only two types of lumber service—fast and slow—and has no "standard" of "normal" service, artificially set up for the purpose of argument in the Motion to Affirm.

Appellant's fast service is no more "normal" than its slow service, and could be called an "expedited" service in comparison with its slow service. But neither the fast nor the slow service is a "normal" or "special" service. Certainly, counsel for the Government is not at liberty to select either the fast or the slow service and use it, in the absence of a statutory "standard," to condemn, or measure the "legal quality" of the other service. Yet, the Motion to Affirm (pp. 7-9) argues that the slow service (but not the fast service) is a "privilege" or "facility" without specification in tariffs, in violation of section 6(7) of the Act because a shipper electing that service has for a longer time the "free use" (though at published tariff rates) of cars in which his lumber is hauled than he has if he elects appellant's fast service. But, since all shippers may, and do, elect either service, the argument is untenable for it merely is that by his election of the slow service a shipper gains an unlawful advantage over himself, and creates a discrimination against himself because he did not elect the fast service. And the argument is further untenable for it overlooks the fact that the fast service is more "expeditious" than the slow service, and is far more "advantageous" than the slow service under some conditions, as argued in cases cited in the Motion to Affirm, pages 10 and 12.

The Motion to Affirm argues that the slow service also results in concessions and advantages to shippers using that service whereby their property is transported at less than

tariff rates even though the tariff rates are admittedly collected and retained by appellant. The slow service, it is argued, is "necessarily a *pro tanto* reduction of the charge for the services required to be given." But this overlooks the fact that the tariff which publishes the rate or charge for the transportation services does not and—under the Government's own admission—is not required to specify any operating schedule or the type of service offered to be performed for the published rate. The fast service, being more expeditious, might well be more costly to appellant and advantageous to the shipper than is the slow service, and, thus, also result in the same kind of alleged reduction of the published tariff charge.

The Motion to Affirm further argues (p. 9) that the slow service results in discrimination against shippers who do not use it but must pay the same freight rate—plus demurrage—if they fail promptly to unload the cars at destination. But, as we have just demonstrated, this reasoning overlooks vital fundamentals which necessarily vitiate the argument. While the needs of some shippers may cause them to use one type of service more often than the other type, the availability of both services is not limited to any particular group of shippers but is offered to all, and the shipper who uses the fast service today might be, and often is, the same shipper who desires and uses the slow service tomorrow; or the same shipper might, and does, use both types of service for different shipments on the same day. The argument that the shippers using the fast service are discriminated against because they would have to pay demurrage *if* the shipments are not unloaded within the free time (48 hours) at destination is fallacious and untenable, for, regardless of fast or slow movement en route, demur-

rage is collectible on *all* shipments not unloaded within 48 hours after delivery at destination.

In arguing that, while operating time schedules for "normal" service are not required to be filed, the offering of "expedited or delayed" service must be filed in tariff form, we think the Motion to Affirm misconstrues the requirements concerning what must be filed in tariffs. While section 6(1) of the Act requires railroads to file tariffs showing all their "rates, fares and charges for transportation" and "all privileges and facilities" which "change, affect, or determine any part or the aggregate of such aforesaid rates, fares and charges, or the value of the service rendered to the passenger, shipper, or consignee" and further requires railroads to file and publish "all other charges which the Commission may require," there is no provision of law, and the Commission has never in the 73 years of its existence issued any order, rule or regulation expressly requiring railroads to publish their operating schedules or to state in tariff form the operating time or schedules of their trains or whether they propose to haul one train or one shipment faster than others.

Having selected and designated appellant's fast service as the only "normal" service that may be performed at the tariff rates, and, having thus established its own statutory "standard" of "normal" movement, the Government's argument is that appellant is forever prohibited from changing to any movement of traffic that requires more or less time than the so-called "normal" movement unless it publishes such change from the "normal" movement in tariff form and makes an extra charge therefor, in addition to the line-haul rate.

Such a view of the law would put such a straitjacket around appellant as to prevent it from making any adjustment in its services to compete with longer routes at the same rates or to maintain any other schedule or time of movement of traffic than the so-called "normal" movement, regardless of appellant's needs or requirements of shippers.

Obviously, if appellant is bound to the so called "normal" movement and may not lawfully alter the time of movement or establish another "normal" movement without making extra charges against shippers therefor, it cannot compete with other routes over which shippers are free to route their traffic at lower rates than the rates that would have to be charged by appellant for any deviation from what the Government regards as its "normal" service. Such rigidly enforced adherence to one fixed or "normal" movement of traffic would completely paralyze appellant's operations and its functioning in the transportation industry.

Such argument blinds itself to realities and to practices existing from the commencement of railroading without challenge under the law until the instant case. It is common public knowledge that railroads have always maintained more than one schedule or type of both freight and passenger service without charging different rates for different schedules or types of service.

For example, it is common public knowledge, publicized in appellant's passenger train timetables, that for many years appellant, in connection with other railroads, performed *three* different passenger services between Chicago and San Francisco. One of these services required 40 hours and 15 minutes, another 48 hours and 20 minutes and the

third 58 hours and 5 minutes. At that time the cost of a bedroom for two or more persons, not including Federal tax, on either of the three trains affording these different services was $46.15, regardless of the fact that passengers using the 58-hour service had the use or benefit of the bedroom and train service 18 hours longer than passengers occupying a similar bedroom on the train affording the 40-hour service, and 10 hours longer than passengers occupying similar bedroom on the train affording the 48-hour service, and the basic railroad fare was the same for all three services, although for a time an extra charge was made for the fastest service because of the type of deluxe equipment that was afforded patrons of that train, but not on the others.

Under the Government's argument in the instant case, the fastest or 40-hour service must be regarded as "normal" and did not require tariff publication, but the 48-hour service and the 58-hour service were not "normal" and, therefore, should have been published in tariff form and an extra charge made therefor because the time required by the trip was different from that required by the "normal" 40-hour trip. Also passengers using the 58-hour service and the 48-hour service obtained the use of the bedroom and train facilities and the "contribution" of trackage and other railroad facilities for a much longer time than passengers using the 40-hour service. Paraphrasing the Government's term free "in car" storage, a passenger using the 58-hour service had the benefit of free "in bedroom" service 18 hours longer than passengers using the 40-hour service, and 10 hours longer than passengers using the 48-hour service and paid the same price for the longer use of the bedroom that passengers paid for the same bedroom for the other

types of service. While this illustration does not involve demurrage, it involves car use and car occupancy and the passengers using the 58-hour or the 48-hour service undoubtedly saved the cost of at least one night's hotel expense.

If, as the Government contends, shippers using appellant's slow service obtain more for their money through the use of facilities and privileges not published in tariffs, but which, the Government says, are of value to them, then it is undeniably true that passengers using the 58-hour service obtained excessive benefits and advantages which, under the Government's argument, must be treated in law as a concession resulting in the passenger's using the 58-hour service obtaining transportation at less than the published fare. But the Government has never challenged the varying passenger services at the same rates nor demanded that the different services or any of them be published in tariff form.

The vitiating fallacy of the Government's whole position in the instant case is that it attempts for the first time in the 73-year existence of the Interstate Commerce Act to make reasonableness of rates dependent entirely upon time in transit or type of service. Never before in the history of railroading or of the Interstate Commerce Commission has anyone attempted to reduce public use of railroad facilities to such Troy Weight fineness.

To further illustrate the absurdity of the Government's rigid adherence to a "normal" service and its view that any departure therefrom or change in time of movement must be published in tariff and an additional charge made for the change in service, it is common knowledge in the

transportation world, and particularly western railroads and shippers to and from the west coast, that, to compete with other western lines, appellant and connecting lines provided, prior to July 1, 1952, a seventh-morning delivery service at Chicago for perishable California fruit and vegetable traffic and that, on that date, because some of the other western lines had reduced the service to six days, appellant reduced its own service to sixth-morning delivery at Chicago. On November 2, 1958, to compete with certain other western lines which had already done so, appellant reduced the time of its service from sixth to fifth morning delivery for California perishables at Chicago.

On westbound freight, in order to compete with other western lines which had reduced their schedules because of shipper demand and truck competition, appellant reduced its service on both perishable and dead freight from seventh to sixth-morning delivery from Chicago to California points and on March 12, 1958, under the same competitive circumstances, appellant reduced its westbound service from sixth to fifth-morning delivery from Chicago to California points. Although the service is now two days faster than it was in 1952, no change in the line-haul rates was made on account of this speeding up of the service and, although the availability of the service was given customary publicity through information circulars distributed to shippers by appellant's traffic representatives, the changes from seven days to six days and later to five days were not published in tariffs nor were any extra or additional charges made for the faster service.

The Government's argument that any change from what it calls "normal" service must be published in tariffs and some charge made therefor is wholly untenable because

there is no law, rule or regulation defining "normal" service and there is certainly no law automatically requiring an additional charge when what was previously "normal" service is changed to make a faster or slower service or when two or three services are performed for the same rate.

The rates charged must be "reasonable" and while the type and cost of performing the service, as well as its value to the shipper, are factors to be weighed in determining the reasonableness of rates to be charged, there has never been any law, rule or contention, until the Government made it in this case, that a charge which is "reasonable" for a "normal" service automatically becomes unreasonably low, thus requiring an additional charge or a higher rate, for performance of a service that is either faster or slower than the so-called "normal" service.

The district court held that in performing slow service for shippers electing it, appellant gives such shippers concessions from the published tariff rates resulting in transporting their property at less than the tariff rates and thus in violation of the Elkins Act. In other words, the argument is that shippers using appellant's slow service obtain their transportation at a less cost to them than the published tariff rates, although the Government admits that appellant collects and retains the full published tariff rates from those shippers. But the argument overlooks and ignores the fact that the cost to shippers using appellant's slow service is not one penny less than the tariff rate nor one penny less or more than the same shippers pay when they use the long circuitous routes, which are nearly twice as long as appellant's routes and necessarily require nearly twice, or more than twice the time in transit that is required for movement over appellant's routes. The long

circuitous routes, therefore, undeniably grant and give to shippers using them the same alleged concessions and advantages which the Government argues they obtain through the use of appellant's slow service; i. e., "in car" storage, longer use of trackage, motive power, other railroad facilities and cost of train crews.

Also, the long circuitous routes afford the shippers more time to find buyers for their shipments, save the shippers demurrage charges and give them the benefit of what the Government calls excessive per diem charges which the long routes must pay for foreign-line cars, and the cost to the long routes of switching and interchanging the cars from one carrier to another of the numerous lines comprising the long routes. In short, for the same tariff rates the long circuitous routes give the shippers nearly twice the number of miles of transportation service that they get when using appellant's slow service over its shorter, direct route. It is idle to argue that shippers using the long circuitous routes do not get any benefit or advantage out of nearly twice the miles of transportation service which, as shown, *infra*, page 12, from the Commission's own figures, cost the long routes $564 more per car to perform, than the same shippers get when using appellant's shorter direct routes.

As already observed, neither the district court nor the Government cite any provision of the Act or any order, rule or regulation of the Commission expressly prohibiting or condemning a railroad's performance of a slow service for the same tariff rate charged for a fast service. Instead, they seek support of the decision below by citing decisions of this Court and of other courts. While the cases cited in the decision below and in the Motion to Affirm abound with

dicta and gratuitous statements concerning the purposes of the Interstate Commerce Act and the Elkins Act, not one of them involves facts or circumstances comparable at all with those involved in the instant case. The decision and Motion quote from the dicta and academic statements in the cited cases but do not disclose the complete dissimilarity of facts which distinguish this case from those cited and make them inapplicable to the instant case.

Turner Lumber Co. v. C., M. & St. P. Ry. Co., 271 U. S. 259, was a suit by a shipper to recover four days' demurrage charges at ten dollars a day paid the railroad by the shipper on a carload of lumber during a car shortage. The shipper contended that the charge was unconstitutional and inflicted undue prejudice against lumber shippers. Neither section 6(7) of the Interstate Commerce Act nor the Elkins Act was involved, nor did the case involve competition of one railroad with others, nor line-haul service by one carrier to meet competition of another, or the type service required by shippers.

Chicago & Alton R. R. Co. v. Kirby, 225 U. S. 155, was an action *in assumpsit* by one shipper to recover damages for failure of the railroad to carry out a *special agreement* with the shipper to transport one shipment of horses from Springfield to Joliet, Illinois, in time to meet a "horse special" train of the Michigan Central Railroad, due to arrive in New York at a particular time which would enable Kirby's horses to be entered in a horse sale in New York. The regular tariff rates were to be charged. The Court held the contract unlawful for the principal reason that it placed the railroad under a liability different and more burdensome than its common law liability. The Court said

that for such special service and greater responsibility the railroad "might" exact a higher rate, but to do so the railroad must make and publish "a rate open to all." While the Court held that, if a higher rate were charged, it must be published, the crux of the decision clearly is that by making a special contract with Kirby for expedited service of a single shipment at the regular tariff rates a special advantage was given to him which was "not open to all." That decision does not require condemnation of appellant's slow service in the instant case for that service, as expressly found by the district court in findings 12 and 30 (R. 199 and 203), is "open to all" through the same type of publicity or dissemination of information to shippers of all operating schedules or types of service offered to shippers by appellant, and the service is undeniably offered to and performed alike for all shippers of all traffic, including "roller" and "firm order" lumber traffic. No extra charge or higher rate is made and no tariff publication is required under the *Kirby* decision.

Eastern Shore of Va. P. Exch. v. New York, P. & N. R. Co., 126 S. E. 674, was a suit for damages based on the railroad's failure to accomplish a shipper's order to "divert" two carloads of cabbage to Jersey City instead of New York, the original destination. Recovery was denied upon the court's holding that the diversion order amounted to a *special contract* with the one shipper to delay the shipment, and was, therefore, void. It is shown by the language at page 676 that the "possibility of discrimination between shippers" was the basis of that decision. There is no such possibility of discrimination in the instant case because appellant's slow service is admittedly offered to and performed alike for all shippers of all traffic.

Louisville & N. R. Co. v. Warren County S. G. Ass'n, 267 S. W. 551, was a suit for damages upon a special contract to deliver certain carloads of strawberries at New York within 78 hours and 45 minutes and at Philadelphia within 55 hours after departure from Bowling Green, Kentucky. The court denied recovery because the special contract with the one shipper "extended a discriminatory preference to it that no other shipper enjoyed under appellant's tariffs." Although the court said that if "time of delivery" is offered as a part of the service it should be published in tariffs, it is made clear at page 552 that this was merely to make the service "open to the shipping public at large, on equal terms." In the instant case appellant's slow service is unquestionably open to the shipping public at large and does not extend any discriminatory preferences to any shipper but is performed for all shippers alike upon equal terms. The service is not the result of special contracts with individual shippers but of the customary publicized information circulars advertising the availability of the service to the shipping public at large.

Atchison, T. & S. F. Ry. Co. v. Springer, 172 F. 2d 346, was a suit by the railroad to recover 47 days' demurrage on one carload of shavings or sawdust. After the car had arrived on the consignee's sidetrack the shipper gave a "diversion" or reconsignment order to the railroad's agent which order did not conform to tariff requirements because it was both verbal and conditional to the extent that it would have required the railroad employees to go on the consignee's private sidetrack, and to weigh the contents of the car. The court held the diversion order to be a nullity and ordered judgment for the railroad. The case bears no resemblance whatsoever to the case at bar.

Siebert v. Erie R. Co., 179 N. Y. S. 136, affirmed 134 N. E. 553, was a suit by a shipper to recover for the loss of certain freight from a car which had been temporarily left on a sidetrack en route "solely for the accommodation of the shipper." The court held that the agreement to leave the car on the sidetrack was unlawful and ordered judgment for the shipper. The court, at page 140, held that the agreement to extend this privilege to that shipper was unlawful because "other shippers paying the same rate for transportation" were not entitled to such accommodation under the bill of lading and tariffs of the railroad. The case does not aid the Government in the instant case because here appellant's slow service is admittedly offered to and performed for all shippers alike at exactly the same rates for transportation.

B. & O. R. Co. v. U. S., 305 U. S. 507, was a case in which the court sustained the validity of an order of the Interstate Commerce Commission condemning as unlawful a practice of certain railroads in the Port of New York furnishing and providing warehouse space and services to shippers at less than cost to the carriers and at less than the rates charged by private warehousemen. In the instant case the appellant collects and retains the published tariff rates and charges and provides only such facilities and performs only the services that are necessary and incident to the transportation services which it offers to perform to the public at the published tariff rates.

CONCLUSION

The judgment below should be reversed and the case remanded to the district court with directions to dismiss the Complaint and to remand the case to the Interstate Commerce Commission for full investigation of the practices of all railroads, including the circuitous routes as well as the direct routes, to the end of determining desirable uniformity and fair competitive relations among all railroads participating in the "roller" lumber traffic.

Respectfully submitted,

ELMER B. COLLINS,
Counsel of Record
for Appellant,
1416 Dodge St.,
Omaha, Nebr.

F. J. MELIA,
JAMES H. ANDERSON,
Attorneys for Appellant.

February, 1960.

PROOF OF SERVICE

I, ELMER B. COLLINS, counsel of record for appellant, and a member of the bar of the Supreme Court of the United States, hereby certify that on the 1st day of February, 1960, I served copies of the foregoing Brief For Appellant on the adverse party, as follows:

1. On the United States of America by mailing a copy in a duly addressed envelope with air mail postage prepaid to:

Honorable J. Lee Rankin
Solicitor General of the United States
Department of Justice
Washington 25, D. C.

and with first-class postage prepaid to:

Roy L. Stephenson, Esq.
United States Attorney
202 U. S. Court House
Des Moines, Iowa

John C. Stevens, Esq.
Asst. United States Attorney
202 U. S. Court House
Des Moines, Iowa

2. On the Interstate Commerce Commission by mailing a copy in a duly addressed envelope with air mail postage prepaid to:

Daniel M. O'Donoghue, Esq.
Attorney
Bureau of Inquiry and Compliance
Interstate Commerce Commission
Washington 25, D. C.

ELMER B. COLLINS,
Counsel of Record
for Appellant.